

April 11, 2005

Civil Division-Kent County (739-7641)

Mr. Timothy P. Mullaney, Sr.
P.O. Box 1227
Dover, DE 19903

Re: **Freedom of Information Act Complaint
Against City of Dover**

Dear Mr. Mullaney:

Our Office received your letter dated September 14, 2004 alleging that the City of Dover (“the City”) violated the open meeting requirements of the Freedom of Information Act, 29 Del. C. Ch. 100 (“FOIA”), by discussing pension plan investment strategy at a meeting of the City Council on September 13, 2004 which matter of public business was not noticed to the public in the agenda posted for that meeting.

By letter dated September 14, 2004, we asked for the City’s response within ten days. We received the City’s response on September 23, 2004. On February 28, 2005, we asked the City for additional documents and information, which we received on March 2, 2005.

According to the City, just before the end of the Council meeting on September 13, 2004, Councilman Slavin made a motion to refer the issue of pension plan investment strategies to the

Legislative, Finance & Administration Committee. As reflected in the minutes:

Mr. Slavin referred to several pieces of correspondence regarding the recent action taken by the Pension Board to change pension investment funds. In addition, he has received telephone calls from participants of the plan, as well as constituents who also have concerns. Although it is evident from the correspondence that there are some issues that need to be further discussed, he relayed concern with the confusion over the issue. He understands that the Pension Boards may have the independent authority to make decisions relative to the plan; however, if the investment strategies fail, Council will be held responsible, which could ultimately affect the taxpayers.

The Council members then discussed whether the motion was in order because the matter was not mentioned in the agenda. The City Solicitor “stated his opinion that the motion would be in order since it simply refers a matter to a Council Committee for their review and discussion.” The Council voted 8-1 to refer the issue to the Legislative, Finance & Administration Committee.

The Legislative, Finance & Administration Committee held a special meeting on September 21, 2004. The only item of public business on the agenda was “Information on Pension Plan Investment Strategy/Process.” The minutes of that special meeting show that it was “an informational presentation on the pension plan investment strategy and process related to the recent Request for Proposals (RFP) for asset managers.” Councilman Slavin made it clear “that the Pension Boards have the authority to make their own decisions and Council has no role in that authority and they were not attempting to vacate, reopen, or otherwise undo the decision of the Pension Boards, only to review the information presented.”

Relevant Statutes

FOIA requires that all public bodies “give public notice of their regular meetings and of their

intent to hold an executive session closed to the public at least 7 days in advance thereof. The notice shall include the agenda,” 29 Del. C. §10004(e)(2).

FOIA defines an “agenda” to be “a general statement of the major issues expected to be discussed at a public meeting.” Id. §10002(f).

The “agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting. Id. §10004(e)(2).

Legal Authority

““An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.”” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997)). “While the statute requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be treated.” Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610 (Aug. 29, 1986) (Allen, C.).

In several previous opinions, we have found that an agenda must be specific enough to give the public notice of what matters of public business would be discussed. *See, e.g., Att’y Gen. Op.* 01-IB10 (June 12, 2001) (agenda “did not draw the public’s attention to the possibility of the

County's issuing \$4.5 million in industrial revenue bonds to construct a new manufacturing facility"); *Att'y Gen. Op.* 02-IB20 (Aug. 30, 2002) ("Town Charter Changes" listed in the agenda, did not sufficiently alert the public that the Town would consider and vote to restrict voter eligibility); *Att'y Gen. Op.* 97-IB17 (Aug. 28, 1997) ("merely giving notice that a specific committee of a public body will meet does not satisfy the agenda requirement of FOIA because that does not specifically alert the public as to the major issues expected to be discussed at a public meeting").

The agenda for the City's September 13, 2004 meeting listed eight items for discussion, none of which would draw the public's attention that pension investment strategies would be discussed. It was under the last item -- "Council Members Comments" -- that Councilman Slank made his motion to refer the matter of pension strategies to the Legislative, Finance & Administration Committee.

The City argues that Section 10004(e) of FOIA "provides that the agenda shall be subject to change to include additional items which arise at the time of the public body's meeting." Without this exception, the City contends, "it would be most difficult, if not impossible for public bodies to handle the many issues that may be unanticipated and arise during the course of a public meeting."

It is true that FOIA authorizes a public body to amend the agenda to include matters that arise at the meeting, but that is not what happened here. Under FOIA, a matter does not "arise" at a public meeting "by way of a motion to add the issue to the agenda. By that circular logic, there would be no limits on what business could be discussed at the meeting of a public body, so long as the agenda provided that it was subject to change. We have previously cautioned that Section 10004(e)(2) of FOIA must be construed narrowly 'lest the exception swallow the rule.'" *Att'y Gen.*

Op. 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op. 03-IB18* (July 31, 2003)).

“We recognize that a public body cannot entirely control what matters citizens may try to raise during a public commentary period at a meeting.” *Att’y Gen. Op. 03-IB17* (July 31, 2003). The same holds true for members of the public body, like the members of the City Council.¹ We do not believe that the notice requirements of FOIA preclude members of the public or the public body from raising a matter of public business outside the agenda during a period reserved for general comments. A comment period serves an important function by allowing individuals the right to bring matters to the attention of the public body so that they might be considered for further discussion.

If a public body wants to discuss a non-agenda item of public business raised during a comment period of a meeting, it must either: (1) amend the agenda to include the matter²; or (2) delay discussion of the matter until a future meeting so that it can be properly noticed to the public. We have cautioned, however, that a public body may amend its agenda during a public meeting to include new matters only “if they arise at the meeting and are reasonably related to items

¹ We note that a member of a public body, unlike an ordinary citizen, may be in a position to control what matters of public business are included for discussion at a public meeting by setting the agenda in advance. “If a public body knows that an item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body’s meeting in order to circumvent the notice requirements of FOIA.” *Att’y Gen. Op. 97-IB20* (Oct. 20, 1997).

² “In the event that FOIA permits a public body to add items to the agenda, the proper procedure is for the public body by motion to vote to amend the agenda.” *Att’y Gen. Op. 03-IB17* (July 31, 2003).

that were noticed in the agenda. At some point, the issues may so far depart from the issues noticed on the agenda that they are better reserved for the next meeting of the public body so that the public will have adequate notice.” *Att’y Gen. Op.*97-IB20 (Oct. 20, 1997).

The pension investment strategies issue raised by Council Slavin at the September 13, 2004 meeting was not reasonably related to items that were noticed in the agenda, so we do not believe that it was an option under FOIA for the Council to have amended the agenda during the meeting to include that important matter of public business. Instead, we believe the Council took the appropriate step to defer any discussion on the merits until the matter could be noticed to the public for a special meeting of a committee of the Council. We determine that this course of action was consistent with the public notice requirements of FOIA.

Timothy P. Mullaney, Sr.
April 11, 2005
Page 7

Conclusion

For the foregoing reasons, we determine that the City did not violate the open meeting requirements of FOIA by allowing a member of the Council to raise a matter of public business -- pension investment strategies -- during the comment period of the City Council meeting on September 13, 2004. When the matter came up during the period reserved for council member comments, the Council properly deferred any further discussion on the merits of the issue until it could be noticed to the public in accordance with FOIA.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin, Esquire
State Solicitor

Timothy P. Mullaney, Sr.
April 11, 2005
Page 8

cc: The Honorable M. Jane Brady
Attorney General

Lawrence W. Lewis, Esquire
Deputy Attorney General

Nicholas H. Rodriguez, Esquire
City Solicitor

Phillip G. Johnson
Opinion Coordinator